BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

STEVEN DUANE HARPER	)	
Claimant	)	
	)	
VS.	)	
	)	
PEOPLEASE CORPORATION	)	
Respondent	)	Docket No. 1,034,733
	)	
AND	)	
	)	
AMERICAN HOME ASSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent requested review of the May 8, 2009 Award by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Board heard oral argument on September 25, 2009 in Wichita, Kansas.

APPEARANCES

Paul V. Dugan, Jr., of Wichita, Kansas, appeared for the claimant. Douglas C. Hobbs, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant suffered a serious infection in his hand that he maintains was the result of either a spider bite or from a scrape or cut, which he contends arose "out of and in the

course" of his employment. After hearing the evidence the ALJ concluded that it was more likely true than not that claimant scraped his finger on an "L" bracket in his truck while reaching for paperwork and that accident gave rise to the introduction of the methicillin-resistant *Staph aureus* (MRSA) infection in his hand. She then assigned a 17 percent permanent partial impairment to claimant's hand, which reflects an average of the ratings offered by Drs. Fluter (22 percent) and Stein (12 percent).

The respondent requests review of this decision and alleges that claimant's recitation of the events calls into question his credibility and the ALJ's finding that the infection was caused by a work-related event. Respondent points to claimant's own statements which initially attribute the puncture on his hand to a spider bite rather than any traumatic injury during his work activities. Respondent then points to later testimony where claimant maintains he scraped or punctured his hand which became the portal for the MRSA infection. Accordingly, respondent asks the Board to reverse the ALJ's Award and deny claimant any compensation in this matter. In the alternative, respondent asks the Board to modify the ALJ's Award to reflect no more than a 4 percent permanent partial impairment consistent with the deposition testimony of Dr. Fluter.

Claimant argues that the ALJ should be affirmed in every respect. He maintains that he initially believed the infection in his hand began with a spider bite and told the ER physician as much. But when told his injury did not involve a spider bite, he recalled the incident where he scraped his hand while reaching for paperwork in the cab of his truck. And according to claimant, he told the same to both the ER doctor and the infectious disease physician he met with in the days following his surgery. Thus, the ALJ's Award recognizes that claimant's infection arose out of and in the course of his employment and should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The threshold issue in this appeal turns on a factual conclusion as to the cause of claimant's infection in his hand. There is no dispute that claimant was a carrier/host for the MRSA bacteria. There is likewise no dispute that claimant had a break in the skin on his left hand, either by virtue of a spider bite or a scrape or puncture which allowed the MRSA bacteria to invade his system and give rise to an infection that required surgical treatment on April 23, 2007, followed by extensive antibiotics. Although he initially was told he would lose one or more fingers, his hand remains intact. How that opening in his hand came into existence is at the heart of this appeal.

Claimant was employed as a truck driver and, on April 18, 2007, he testified that he reached back onto a shelf in his truck for some paperwork. As he did, he says that he cut

or punctured the base of his middle finger on an "L" bracket that was installed in the shelf. He saw a small bit of blood, wiped it off and says that he wrapped the wound with a bandage, possibly covering it with antibiotic ointment.

According to claimant's father, he called claimant on his cell phone not long after this incident and noted something in claimant's voice. Claimant told his father about the cut and nothing more was said. He mentioned nothing about a spider bite. Claimant continued on with his work, delivering his load and eventually returning to the Kansas City area. Over the next few days, claimant's finger symptoms worsened. The hand and finger swelled and a white bump or pimple developed in the area of the puncture or scrape. There was a white core in the middle of the bump and according to claimant, this was similar in appearance to a spider bite that he'd had before.[1]

When he returned to Kansas City, claimant told Larry Biles, respondent's head of safety, and Carol Wood, one of respondent's recruiters, that if his hand did not improve he was going to have to go to the doctor. There was no discussion about a workers compensation claim, nor of respondent providing claimant with any medical treatment. Claimant testified that when his hand was no better he asked for a load to Wichita so that he could go to the hospital there. Claimant was given such a load and after dropping it off on April 23, 2007, he sought medical treatment.

At the ER in Wichita, Kansas, the records indicate claimant told the doctor that he thought he might have been bitten by a spider. Claimant's testimony confirms that he *believed* he had been bitten based on the appearance of his hand (and his past experience) although he did not actually observe the bite or a spider.[2] But as noted by the ALJ, upon further reflection the claimant testified at the Regular Hearing that he also told the emergency room personnel that he had cut his finger on the bracket in his truck.[3] This is not reflected in the ER record. It must also be noted that at an earlier preliminary hearing, claimant testified he *first* reported the cut was from a bracket several days after presenting to the emergency room and while he was hospitalized following surgery.[4] It is this apparent inconsistency that has given rise to this dispute and the resulting appeal. In essence, respondent contends that claimant conveniently manufactured his story about cutting his hand on the "L" bracket once he learned that his medical bills and time off work were going to be significant.

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[1] R.H. Trans. at 15, 30.

[2] *Id.* at 30-31.

[3] *Id.* at 35.

[4] *Id.* at 32.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[5] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[6]

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[7] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[8]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[9]

In this instance, it is the arising "out of" element that is directly in dispute. As noted by the ALJ, "[t]he physicians who examined claimant and who testified in this matter all agree that claimant sustained a severe infection caused by the MRSA bacteria. The physicians also agree that a cut on claimant's finger or a spider bite could have created a portal of entry for the MRSA infection in his left hand."[10] The remaining element to be decided is whether claimant, in fact, sustained the cut or spider bite while working as he

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[5] K.S.A. 2006 Supp. 44-501(a).

[6] K.S.A. 2006 Supp. 44-508(g).

[7] K.S.A. 2006 Supp. 44-501(a).

[8] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[9] *Id.*

[10] ALJ Award (May 8, 2009) at 3.

contends. Or is his credibility so damaged by the purported inconsistencies reflected in the record that he is not to be believed and thus has failed to meet his evidentiary burden.

The ALJ found as follows:

> The trier of fact is persuaded that claimant did in fact scrape his finger on an L bracket in his truck which led to the MRSA infection. Claimant has been consistent in his factual description of the injury and the events that follow the injury from his discovery deposition to the testimony given in the regular hearing. Accordingly, the Court finds that claimant met with personal injury by accident, arising out of and in the scope of his employment with respondent on the dates alleged.[11]

The Board has carefully considered the entire record as a whole as well as the parties' arguments and briefs to the Board. And after having done so, the Board is persuaded by claimant's evidence and testimony and finds the ALJ's conclusion that claimant sustained an injury arising out of and in the course of his employment should be affirmed. The Board has, in the past, given some deference to the Administrative Law Judges as they are in the unique position to evaluate the witnesses and their demeanor.[12] Here, the ALJ was apparently persuaded by claimant and his recitation of the events.

Moreover, the Board is also persuaded by the fact that the ER records include a reference to a spider bite, along with a "?". This suggests that claimant indicated his injury may have been as a result of a spider bite but that he was not entirely sure. It may well have been that the seriousness of his infection led them to move forward with his care rather than dwell on the source. Claimant could well have told them of the injury from the "L" bracket and it simply did not make it into his records. And only after the surgery when things had settled down did the infectious disease physician go to greater lengths to determine the source of his MRSA infection. Thus, while on the face it may appear that claimant was inconsistent as to the onset of his problems, it is more probably true than not that he did scrape his hand on the "L" bracket and then press ahead, not thinking much more about it until the symptoms led him to the ER. Even at that point, the wound looked more like a spider bite to claimant than any sort of scrape or puncture. For these reasons, the ALJ's threshold finding with respect to compensability is affirmed.

Having concluded claimant has a compensable injury, the Board must consider the functional impairments contained within the record. Dr. George Fluter examined claimant at the request of his attorney. Dr. Fluter opined that claimant had sustained a 22 percent

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[11] *Id.* at 4.

[12] *Evans v. Aerotek,* No. 1,042,073, 2009 WL 607660 (Kan. WCAB Feb. 10, 2009).

impairment to the left upper extremity based upon the 4th Edition of the *Guides.*[13] According to Dr. Fluter, claimant had individual impairments to each of the four fingers on his left hand and when combined, these totaled 22 percent to the hand. But because he believed claimant sustained a 2 percent range of motion loss to the wrist as well, he combined that rating with the hand impairment and the result was 22 percent to the upper extremity at the forearm.[14]

Respondent cross-examined Dr. Fluter with regard to his impairment rating and asked him if, as claimant testified at the Regular Hearing, he had no range of motion problems in any of the fingers in his left hand, would claimant's impairment rating be different. Dr. Fluter testified that if there were no such range of motion issues then he would find claimant's permanent partial impairment to be 0 percent to the left hand.[15] But he also testified that an individual's range of motion may be functional but still be abnormal based upon the tables contained in the *Guides*.[16]

Respondent also points to the testimony of Dr. Stein, who examined and rated claimant at its request on February 10, 2009. According to Dr. Stein, claimant bears a 12 percent permanent partial impairment to the left hand as a result of his injury. He noted no range of motion issues in claimant's middle and index fingers, but did find some evidence of range of motion limitations in the ring and small fingers along with a lack of strength in the hand.[17]

After considering the entirety of the record as well as the ALJ's analysis, the Board finds the ALJ's assessment of claimant's permanency, 17 percent to the hand, should be affirmed. The Board is not persuaded by the cross-examination testimony of Dr. Fluter. Although claimant expressed no complaints at the Regular Hearing about the range of motion in his individual fingers, his examination with Dr. Fluter no doubt included more precise tests to determine claimant's limitations. In other words, claimant might not appreciate the limits he has in his individual fingers, but they are nevertheless present due to the infection and resulting surgery. Thus, the ALJ's decision to average Dr. Stein's impairment (12 percent) with that offered by Dr. Fluter (22 percent*)* is reasonable under the circumstances and is therefore affirmed.

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[13] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

[14] Fluter Depo. at 17.

[15] *Id*. at 34.

[16] *Id*.

[17] Stein Depo. at 9.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated May 8, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Paul V. Dugan, Jr., Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge